Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ILLINOIS,

Petitioner,

vs.

ANNE COX,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of Illinois ignored substantial precedent from this Court that a canine sniff is not a search, when it applied *Terry v. Ohio*, 392 U.S.1 (1977), to a canine sniff performed at a routine traffic stop.

II. Whether the Supreme Court of Illinois disregarded this Court's holding in *United States v. Sharpe*, 470 U.S. 675, when it effectively established a *per se* maximum time limit for reasonable *Terry* stops resulting from routine traffic violations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully requests that this Court issue a writ of *certiorari* to the Supreme Court of Illinois to review that court's judgment and opinion entered on December 5, 2002.

OPINIONS BELOW

On December 5, 2002, the Supreme Court of Illinois issued its opinion in this case, *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (2002). This decision is reprinted in the appendix to this petition. The December 5, 2000, opinion of the Illinois Appellate Court is also reprinted in the appendix to this petition. *People v. Cox*, 318 Ill.App.3d 161, 739 N.E.2d 1006 (5th Dist. 2000).

JURISDICTION

The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a), since, in the proceedings in the state courts of Illinois, Respondent asserted an alleged violation of her rights arising under the United States Constitution.

STATEMENT OF THE CASE

On July 20, 1998, the defendant, Anne Cox, was charged by information with the offense of unlawful possession of cannabis. The defendant filed a motion to suppress evidence, alleging in part that Illinois law does not permit police to search vehicles after routine traffic stops unless police possess a strong suspicion that the vehicle is carrying drugs or weapons. At the hearing on the defendant's motion to suppress, the defendant called as a witness Matt McCormick, the arresting officer from the Fairfield Police Department. Officer McCormick testified that, at around

2:21 a.m. on July 18, 1998, he observed the defendant's vehicle operating without a rear registration light. Officer McCormick stopped the vehicle and spoke with the defendant. Immediately after the stop, McCormick called for a canine unit to conduct a "sniff" of the exterior of the vehicle. Within fifteen minutes, and while Officer McCormick was engaged in the normal ticket-writing procedures for a traffic stop, a sniff was conducted by the canine unit and the dog positively alerted. Because the dog alerted, the vehicle was searched and cannabis residue and seeds were found on the floorboard of the vehicle. The defendant was then asked to empty her pockets. More contraband was found on her person as she pulled a quantity of cannabis from her pockets.

Following the hearing, the trial court entered an order granting the motion to suppress. The trial court concluded that "the officer's testimony revealed no reasonable basis which would justify the walk around." The trial court relied on the Illinois case of *People v. Easley*, 288 Ill.App.3d 487, 680 N.E.2d 776 (3rd Dist. 1997), which applied this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1977).

On appeal, the Illinois Appellate Court, Fifth District, affirmed the trial court's suppression of the evidence. The appellate court held that a canine sniff of the exterior of a lawfully stopped automobile was not a search under the Fourth Amendment to the United States Constitution, therefore the "sniff" was entirely permissible under the Federal Constitution. *People v. Cox*, 318 Ill.App.3d 161, 165, 739 N.E.2d 1066 (5th Dist. 2000). Nevertheless, the appellate court affirmed the order of suppression based on Article I, section 6 of the 1970 Illinois Constitution. 318 Ill.App.3d at 166. The appellate court held that *Terry* standards should be satisfied before permitting a canine sniff of a vehicle. In other words, the officer must be able to point to a reasonable and articulable suspicion of crimi-

nal activity to justify the "sniff." 318 Ill.App.3d at 169. In affirming the trial court's suppression order, the appellate court effectively created a privacy right in odors a citizen of Illinois had exposed to the outside world. The appellate court based its decision largely on cases from other states. 318 Ill.App.3d at 169.

On December 5, 2002, the Supreme Court of Illinois affirmed the holding of the appellate court, but did so without resorting to the Illinois Constitution. The court held that fifteen minutes was too long a period of time for the issuance of a warning ticket or citation for a routine traffic violation, and then further stated that canine sniffs at traffic stops must be justified by a reasonable, articulable suspicion as set forth in *Terry*. *People v. Cox*, 202 Ill.2d 462, 469-471,782 N.E.2d 275 (2002).

Petitioner, the State of Illinois, now seeks a writ of *certiorari* from this Court to review the judgment and opinion of the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Illinois Supreme Court Ignored Substantial United States Supreme Court Precedent When It Incorrectly Afforded Fourth Amendment Protection To A Canine Sniff Performed At A Routine Traffic Stop.

At issue is whether a "sniff" by a trained canine constitutes a search within the meaning of the Fourth Amendment to the Constitution of the United States. In the present case, the Supreme Court of Illinois concluded that the canine sniff of Defendant's vehicle was impermissible because it was not supported by "'specific and articulable facts' justifying. . ." the use of the dog. *People v. Cox*, 202 Ill.2d 462, 471, 782 N.E.2d 275 (2002). In support

of this conclusion, the Illinois court cited this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which recognized the propriety of a limited class of minimally-intrusive searches and seizures of a person based on something less than the traditional probable cause requirement. *Cox*, 202 Ill.2d at 278-79. Apparently applying the rationale of *Terry* to the scope of the traffic stop, the Illinois court ruled that the "dog sniff of defendant's vehicle was [not] justified." *Cox*, 202 Ill.2d at 280.[1] Thus, it is clear that the court in *Cox*, by analyzing the propriety of the canine sniff under *Terry*, applied a Fourth Amendment analysis to a police procedure which this Court has determined, in *United States v. Place*, 462 U.S. 696 (1983) and subsequent decisions, raises no Fourth Amendment issue.

The Fourth Amendment protects against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S.C.A. 4. However, search and seizure are terms which, while often used together as a single concept in law, have separate meaning. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A seizure involves the capture, detention, or other "meaningful interference with an individual's possessory interests in . . . property." *Id.* A seizure also occurs where there is similar interference, "however brief, with an individual's freedom of movement." *Id.*, *citing Michigan v. Summers*, 452 U.S. 692, 696 (1981). By contrast, a search is more subjective and limited in scope, occurring only when there is an interference with some expectation of privacy, and that expectation is both reasonable and legitimate. *Id.*, *see also Terry*, supra, *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). A possessory interest in contraband is not a legitimate one which gives rise to Fourth Amendment protection.

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[1] It should be noted that the Supreme Court of Illinois did not base its decision on any provision of the Illinois Constitution.

This Court has repeatedly explained that the use of a trained narcotics detection dog is not a search. *See, Place*, 462 U.S. at 706-707 (exposure of luggage to a trained narcotics detection dog is not a search within the meaning of the Fourth Amendment); *see also Jacobsen*, 466 U.S. at 124 (limited field test, like the canine sniff in *Place*, does not compromise any legitimate interest and is therefore not a search); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("The fact that officers walk a narcotics-detection dog around the exterior of a car at . . . checkpoints does not transform the seizure into a search."). These cases focus on three key elements: the minimal intrusion presented by the canine, the fact that the process reveals nothing about noncontraband items, and the absence of a legitimate privacy interest in contraband.

In *Place*, this Court held that a canine sniff is not a search because, as an investigative procedure, it is a limited technique, both in terms of manner and scope of information discovered. *Place*, 462 U.S. at 707. Also considered was the presence of the item subjected to the sniff—in that case luggage at an airport—in a public place, which lent a corresponding decrease in any expectation of privacy. *Id.* In addition, the canine sniff did not require probable cause or other objective support:

> Obviously, if this investigative procedure [the canine sniff] is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.

Id. citing Terry, 392 U.S. at 20. Thus, the use of a canine to examine an item, provided that the item was lawfully detained, was not a search and implicated no Fourth Amendment rights.

The holding in *Place* was strengthened a year later by extending its underlying analysis and rationale in *United States v. Jacobsen*, 466 U.S. 109 (1984). In *Jacobsen*, a white powdery substance was discovered by employees of a private courier when the bag was opened to further inspect damage caused in transit. *Jacobsen*, 466 U.S. at 111. The employees notified the Drug Enforcement Administration, which dispatched agents who subsequently took field samples which indicated that the substance was cocaine. *Id.* at 111-12. A motion to suppress the cocaine as a product of an illegal search and seizure was denied, and defendants were convicted and appealed. *Id.* at 112.

In affirming the decision of the trial court to deny the motion, this Court examined closely both its conclusion in *Place* and the underlying rationale. While recognizing that chemical tests and canine sniffs are different procedures, this Court focused on the fact that both methods are capable only of detecting the presence of contraband, which "does not compromise any legitimate interest in privacy." *Id.* at 123. Further, neither a sniff nor a chemical test can reveal any other private fact legitimately protected under the Fourth Amendment. This Court attributed its holding in *Jacobsen* directly to the rule enunciated in *Place*, emphasizing in several passages that the key premise was the inability of either type of test to reveal anything at all about legitimately protected privacy interests. *Id.* at 123-24.

More recently, this Court extended the ruling in *Place* to hold that the addition of a canine sniff to an already legitimate traffic seizure does not alter the character of that seizure to make it a search. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Citing *Place*, the Court recalled the now-familiar theme that canines are incapable, due to their training, of revealing anything other than

the presence of narcotics. *Edmond*, 531 U.S. at 40. This case serves both to recognize the firmly-rooted rule that a "sniff is not a search," and to note that the traffic stop does not change the underlying rationale of that rule.

The Supreme Court of Illinois did not acknowledge *Edmond*, but its opinion implies a distinction between a canine sniff of luggage at an airport and a canine sniff performed at a routine traffic stop. *Edmond*, of course, plainly states otherwise: "The fact that officers walk a narcotics-detention dog around the exterior of each car at Indianapolis checkpoints does not transform the seizure into a search." 531 U.S. at 40. There is no basis for drawing such a distinction; the application of the rationale of *Place* to traffic stops is a logical one. The state court's invocation of *Terry* is an inappropriate attempt to circumvent this Court's prior decisions that Fourth Amendment protections do not apply to canine sniffs.

This Court has repeatedly declined opportunities to apply the reasonable suspicion requirements of *Terry v. Ohio*, 392 U.S. 1 (1968), to canine sniffs. In *Place*, the Court concluded that "the principles of *Terry* and its progeny would permit the officer to *detain*" the object of the search. *Place*, 462 U.S. at 706 (emphasis added). The very next step in the process, this Court noted, was "to arrange [exposure of the luggage] to a narcotics detection dog." *Id.* Instead of applying *Terry* to that part of the investigative process, the majority elected to keep separate the issues of detention and use of the canine. This Court stated emphatically that a sniff is extraordinarily limited in scope and manner, and is not a "'search' within the meaning of the Fourth Amendment." *Id.* at 707. While concurring Justices Brennan and Marshall noted their belief that "a dog sniff may be a search" justifiable under *Terry*, *id.* at 723 (Brennan and Marshall, JJ., concurring in the judgment), the fact that this suggestion receives no recogni-

tion in the opinion of the majority indicates the Court's belief that the principles of *Terry* have no application to canine sniffs.

The *Jacobsen* majority also declined the opportunity to extend *Terry* to canine sniffs. *See*, generally, *Jacobsen*, 466 U.S. 109 at 123-25. While citing *Terry* for the purpose of defining what constitutes a search, this Court chose not to extend either definition to the canine sniff. *Jacobsen*, 466 U.S. at 113, n.4 & n.5. The majority applied *Terry*'s balancing test for reasonableness only to the actual seizure of the materials containing the contraband, not to the underlying nature of the investigative method. As in *Place*, this Court implicitly rejected a suggestion by the dissent that *Terry* principles might be applied to a sniff. *Id.* at 141 (Brennan and Marshall, JJ., dissenting) (*citing* their own concurrence in the judgment of *Place*).

Finally, this Court again had occasion to apply *Terry* to canine sniffs in *Edmond*. This opportunity also passed without adoption, with *Terry* relegated to a footnote in an opinion which clearly considered the role of canines in the context of a traffic stop. 531 U.S. 32, 47. Instead, the majority opinion chose to characterize sniffs as a minimally intrusive procedure not "designed to disclose any information other than the presence or absence of narcotics[,]" the addition of which does not change the character of an otherwise lawful detention. *Id.* at 40 (*citing Place*).

Considered jointly, *Place, Jacobsen,* and *Edmond* establish that canine sniffs are permissible where the item subjected to the sniff is lawfully detained. This rule is founded in the limited scope of the test, combined with the absence of any protectable interest in the contraband detected. Permitting the Supreme Court of Illinois to contravene this long-established rule violates this Court's prior decisions, and has a potentially severe impact on

the State's ability to utilize an extraordinarily effective tool in law enforcement.

The opinion of the Supreme Court of Illinois is a difficult one to analyze. It begins with a lengthy *Terry* analysis directed at traffic stops (*Cox*, 202 Ill.2d at 466-468), breaks for a conclusion that the police officer took too long to write a routine traffic citation (*Id.* at 468-470), and continues to a conclusion that because the police officer "did not have 'specific and articulable facts' justifying the call . . . for assistance and the subsequent dog-sniff test of the defendant's vehicle," the evidence recovered was properly suppressed. *Id.* at 471. Because the analysis in the opinion is fractured, the court's application of *Terry* to vehicle canine sniffs might be interpreted as an alternative holding.[2] However, Petitioner submits that the final paragraph of the court's analysis suggests otherwise:

> We conclude that the dog-sniff test of defendant's vehicle was impermissible. Officer McCormick did not have "specific and articulable facts" justifying the call to Deputy Zola for assistance and the subsequent dog-sniff test of defendant's vehicle. Further, defendant's detention, considered in light of the scope and purpose of the traffic stop, was overly long. Accordingly, we find that the circuit court properly suppressed the evidence recovered by the police.

Id. If the Illinois Supreme Court's interpretation of traffic-stop canine sniffs as *Terry*-implicative is permitted to stand, the result will be significant confusion for law enforcement and lower courts attempting to reconcile this Court's jurisprudence with the state court's holding.

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[2] In fact, the dissenting opinion characterizes the discussion of the canine sniff as *dicta*. *Cox*, 202 Ill.2d at 478 (Thomas, J., dissenting).

II.

Certiorari Should Be Granted Because The Illinois Supreme Court's Determination That Fifteen Minutes Is Too Long For A Routine Traffic Stop Dictates An Absurd Application Of The Fourth Amendment To Citizens Suspected Of Minor Traffic Violations.

The Supreme Court of Illinois concluded that the fifteen minute detention of the defendant following a routine traffic stop was too long and therefore, improper. *People v. Cox*, 202 Ill.2d 462, 469-471, 782 N.E.2d 275 (2002). The state court acknowledged the decision in *United States v. Sharpe*, 470 U.S. 675 (1985), in which this Court rejected the notion of a *per se* maximum time limit for reasonable *Terry* stops. However, without citation to any particular facts, the court initially held that the stop of the defendant was "a routine traffic stop, which should have resulted in a correspondingly abbreviated detention." *Cox*, 202 Ill.2d at 470. Later, in its concluding remarks, the court held that, "defendant's detention, in light of the scope and purpose of the traffic stop, was overly long." *Id.* at 471.[3] This determination appears at odds with this Court's decision in *Sharpe*, and results in an absurd application of the Fourth Amendment in Illinois.

As the dissent points out, the Supreme Court of Illinois' determination that fifteen minutes is too long for police to detain an individual following a "routine" traffic stop in order to issue a warning ticket or traffic citation, encourages police to conduct a full custodial arrest rather than risk running afoul of *Terry* by detaining that individual for fifteen minutes or more. *See, Cox*, 202 Ill.2d

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[3] The dissent describes the holding regarding the defendant's detention as "draw[ing] a constitutional line in the sand at 15 minutes." *Cox*, 202 Ill.2d at 475 (Thomas, J., dissenting).

at 475 (Thomas, J., dissenting). An arrest of the defendant in this case would have been permissible pursuant to this Court's holding in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), wherein this Court held that the Fourth Amendment does not prohibit a warrantless arrest for minor traffic violations that are punishable by only a fine. *Id.* at 354. In the underlying case, the defendant was driving without a rear-registration light, an offense punishable by a fine. *See*, 625 ILCS 5/12-201(c)(2000), 625 ILCS 5/16-104 (2000), 730 ILCS 5/5-1-17 (2000). Therefore, a full, custodial arrest of the defendant would have passed constitutional muster, where the nearly fifteen minute traffic stop resulted in a violation of the defendant's Fourth Amendment rights. The Supreme Court of Illinois disregarded this Court's statement on maximum time standards for *Terry* stops, and the result places law enforcement officers and the citizens of Illinois in an absurd Fourth Amendment quandry.

CONCLUSION

The Supreme Court of Illinois ignored this Court's clear holdings that a "sniff is not a search" for the purposes of the Fourth Amendment. By applying *Terry* to a canine sniff at a routine traffic stop, the Illinois court contravened a long-standing rule of law with emphatic support in this Court's subsequent opinions on the subject. The Supreme Court of Illinois also disregarded this Court's precedence when it established a *per se* maximum time for reasonable *Terry* stops resulting from routine traffic violations. Allowing the lower court's decision to stand in this matter would inhibit an accepted and effective law enforcement tool, result in an absurd application of the Fourth Amendment to citizens suspected of minor

traffic violations, and undermine this Court's authority to be the final arbiter regarding the meaning of the Constitution of the United States.

Respectfully submitted,

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APPENDIX

App. 1

[Filed December 5, 2002]

Docket No. 90759–Agenda 5–January 2002.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v. ANNE F. COX, Appellee.

Justice FREEMAN delivered the opinion of the court:

Defendant, Anne F. Cox, filed a motion to suppress evidence seized by law enforcement personnel during a search of her car and her person following a traffic stop. The circuit court of Wayne County granted the motion. The appellate court affirmed. 318 Ill.App.3d 161. We granted the State's petition for leave to appeal (177 Ill.2d R. 315(a)). For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

On July 18, 1998, at approximately 2:21 a.m., Officer Matt McCormick of the Fairfield police department stopped defendant's vehicle because it did not have a rear registration light. At the time of the stop, Officer McCormick called Deputy Dave Zola and asked him to bring his canine, Tango, to the scene. Officer McCormick did not smell cannabis in defendant's vehicle, nor did he have other reasons to request Deputy Zola's assistance at the scene.

Deputy Zola arrived approximately 15 minutes later, while Officer McCormick was writing the traffic ticket. Deputy Zola walked Tango around defendant's vehicle, and Tango alerted to the presence of drugs. The officers had defendant step out of the vehicle. Officer McCormick searched the vehicle and found "possible cannabis seeds and residue" on the floorboard. Deputy Zola then conducted a "pat down" search of defendant and found cannabis on her person. The officers arrested defendant for possession of less than 2.5 grams of a substance containing cannabis.

Defendant filed a motion to suppress evidence. Defendant argued that the officers did not have probable cause to conduct the canine sniff, and that the stop for a minor traffic violation was unnecessarily and illegally long. The trial court granted the motion, stating:

> "In the instant case, the officer made a traffic stop based upon an observed traffic violation. There was no testimony from the arresting officer that Defendant had a past record, had been involved in drug related activities or that either Defendant or the interior of the vehicle smelled of marijuana or any other controlled substance. The[re] was no outstanding warrant for Defendant's arrest. The officer did not state that the search was the result of a general plan or random pattern of canine searches during traffic stops. In short, the officer's testimony revealed no reasonable basis which would justify the walk around. Moreover, if the walk around was invalid, then the officers had no basis for a pat down search of Defendant; she would have been released without arrest on the traffic ticket."

On appeal, the appellate court affirmed the trial court's suppression order. 318 Ill.App.3d 161. The appellate court observed:

> "In this case, the officer lacked reasonable suspicion sufficient to call the canine unit. At the motion-to-suppress hearing, Officer McCormick could point to no fact that aroused his suspicion. *Terry* and its progeny clearly establish that when an officer investigates based on reasonable suspicion, he must be able to point to articulable facts that gave rise to said suspicion." 318 Ill.App.3d at 167.

This court granted the State's petition for leave to appeal.

ANALYSIS

As noted above, the circuit court granted defendant's motion to suppress evidence recovered during the search of her vehicle and her person following the traffic stop. Generally, a motion to suppress evidence presents mixed questions of law and fact: the trial court first weighs the evidence and determines the facts surrounding the complained-of conduct, after which it decides whether, as a matter of law, these facts constitute an unconstitutional seizure. *People v. Thomas*, 198 Ill.2d 103, 108 (2001); *People v. Shapiro*, 177 Ill.2d 519, 524 (1997). A reviewing court accords great deference to the factual findings of the trial court. *Thomas*, 198 Ill.2d at 108. However, the reviewing court considers *de novo* the trial court's ultimate determination to grant or deny the defendant's motion to suppress. *Thomas*, 198 Ill.2d at 108; *People v. Sorenson*, 196 Ill.2d 425, 431 (2001).

The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This provision applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607, 614 (1975); *People v. Smithers*, 83 Ill.2d 430, 433-34 (1980). Reasonableness under the fourth amendment generally requires a warrant supported by probable cause. *People v. Flowers*, 179 Ill.2d 257, 262 (1997); *People v. Long*, 99 Ill.2d 219, 227 (1983).

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court recognized a limited exception to the traditional probable cause requirement. The Court held that a police officer, under appropriate circumstances, may briefly detain a person for question-

ing if the officer reasonably believes that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906-07; *Flowers*, 179 Ill.2d at 262; *Smithers*, 83 Ill.2d at 434.

The conduct constituting the stop under *Terry* must have been justified at its inception. *Thomas*, 198 Ill.2d at 109. A court objectively considers whether, based on the facts available to the police officer, the police action in detaining the defendant was appropriate. To justify the intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences therefrom, reasonably warrant that intrusion. *Terry*, 392 U.S. at 20-21, 88 S.Ct. at 1879-80, 20 L.Ed.2d at 905-06; *Long*, 99 Ill.2d at 227-28. While the facts supporting the officer's suspicions need not rise to the level of probable cause, they must be based on more than a mere hunch. *Thomas*, 198 Ill.2d at 110.

In addition to the requirement that the conduct constituting the stop be justified at its inception, the police officer's action must be reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 19-20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905. As the Court emphasized in *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983) (plurality opinion), "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." The State bears the burden of showing that a seizure based on reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Royer*, 460 U.S. at 500, 103 S.Ct. at 1326, 75 L.Ed.2d at 238 (plurality opinion); *People v. Brownlee*, 186 Ill.2d 501, 519 (1999).

The standard for determining the reasonableness of a *Terry* investigatory stop has been codified in our Code of Criminal Procedure of 1963 (725 ILCS 5/107-14 (West

1998)). *Thomas*, 198 Ill.2d at 109, *Brownlee*, 186 Ill.2d at 518. The same standard is applied in determining the propriety of an investigatory stop under article I, section 6, of the 1970 Illinois Constitution (Ill. Const. 1970, art. I, § 6). *Thomas*, 198 Ill.2d at 109, citing *People v. Tisler*, 103 Ill.2d 226, 241-45 (1984) (the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution).

When a police officer observes a driver commit a traffic violation, the officer is justified in briefly detaining the driver to investigate the violation. *Sorenson*, 196 Ill.2d at 433; *Brownlee*, 186 Ill.2d at 517. The officer may perform some initial inquiries, check the driver's license, and conduct a speedy warrant check. *People v. Ortiz*, 317 Ill.App.3d 212, 220 (2000); *People v. Easley*, 288 Ill.App.3d 487, 491 (1997); *People v. Koutsakis*, 272 Ill.App.3d 159, 163 (1995). If no further suspicion is aroused in the officer following these inquiries, the traffic stop should go no further. *Ortiz*, 317 Ill.App.3d at 220; *Easley*, 288 Ill.App.3d at 491; *Koutsakis*, 272 Ill.App.3d at 163. The officer should issue a warning ticket or a citation, as appropriate, and allow the driver to leave. *Koutsakis*, 272 Ill.App.3d at 164.

Turning to the present case, the State notes that Officer McCormick stopped defendant's vehicle because it did not have a rear registration light. The State maintains that Officer McCormick was justified in initiating the traffic stop. The State also maintains that the dog sniff of defendant's vehicle was proper since Deputy Zola and his dog, Tango, arrived at the scene while Officer McCormick was writing the traffic ticket.

Defendant notes that Officer McCormick called Deputy Zola to the scene at the time that Officer McCormick initiated the traffic stop. Officer McCormick did not have any

reason to believe that defendant's vehicle contained a controlled substance. According to defendant, the dog sniff was impermissible because Officer McCormick's decision to call Deputy Zola to the scene was not based on a reasonable and articulable suspicion that defendant's vehicle contained a controlled substance. Defendant also notes that the State failed to present evidence regarding Tango's training and reliability. Defendant maintains only an alert by a trained dog constitutes probable cause to search a vehicle. Defendant concludes that an alert by Tango could not provide the officers with probable cause to search her vehicle.

While we agree with the State's contention that Officer McCormick properly initiated the traffic stop, we disagree with the State's further contention that the dog sniff of defendant's vehicle was justified. We note that Officer McCormick did not smell marijuana in defendant's vehicle. Officer McCormick did not have any reason to suspect that defendant's vehicle contained a controlled substance. In sum, Officer McCormick did not have any reason to request Deputy Zola's assistance at the scene. Rather than conducting an inquiry into the circumstances of the traffic violation, and issuing defendant a warning ticket or citation, Officer McCormick broadened the scope of the traffic stop to include a drug investigation.

The State maintains, however, that the dog sniff of defendant's vehicle was justified because Deputy Zola arrived at the scene while Officer McCormick was writing the traffic ticket. We disagree. We note that Deputy Zola arrived at the scene approximately 15 minutes after the initial traffic stop. While we will not impose a rigid time limitation on the duration of a traffic stop, we are concerned with the duration of the traffic stop in the present case. See *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605, 615 (1985) ("While it is clear that 'the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in

determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion,' *United States v. Place*, *supra*, at 709, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes"). We have examined the record and find that it is devoid of circumstances which would justify the length of the detention. Rather, the record leads us to conclude this was a routine traffic stop, which should have resulted in a correspondingly abbreviated detention. See *People v. Luna*, 322 Ill. App.3d 855, 859 (2001) ("An officer may not stall at the scene of a traffic stop until a drug-sniffing dog arrives and creates probable cause to conduct a search of a vehicle"); *People v. Ruffin*, 315 Ill.App.3d 744 (2000); *People v. Smith*, 315 Ill.App.3d 772 (2000); *Koutsakis*, 272 Ill.App.3d at 164 ("An officer's authority to investigate a traffic violation may not become a subterfuge in order to obtain other evidence merely based on the officer's suspicion"). Officer McCormick should have issued a traffic citation or warning ticket to defendant expeditiously. Had he done so, defendant would have left the scene of the traffic stop prior to the arrival of the canine unit.

Moreover, were we to accept the State's contention that the dog-sniff test was permissible, we would be endorsing a drug-sniff test at every stop for a traffic violation. Again, we note that Officer McCormick called Deputy Zola to the scene when Officer McCormick first initiated the traffic stop. At that time, Officer McCormick did not have any reason to call Deputy Zola to the scene. Officer McCormick did not testify that he smelled marijuana in the vehicle. Officer McCormick did not testify that he saw any object in the vehicle that led him to suspect defendant possessed a controlled substance. Officer McCormick did not testify that defendant appeared nervous or that defendant's answers to questions he posed aroused his suspicions. In sum, Officer

McCormick did not have "specific and articulable facts which, taken together with rational inferences therefrom," reasonably warranted an extended detention of defendant's vehicle, and the ensuing drug-sniff test. He did not have even a hunch that defendant was engaged in criminal activity to support the call to Deputy Zola. Given these circumstances, if we held that Officer McCormick was justified in calling the canine unit, we would clearly support the view that police officers can resort to the use of canine units at every traffic stop.

We conclude that the dog-sniff test of defendant's vehicle was impermissible. Officer McCormick did not have "specific and articulable facts" justifying the call to Deputy Zola for assistance and the subsequent dog-sniff test of defendant's vehicle. Further, defendant's detention, considered in light of the scope and purpose of the traffic stop, was overly long. Accordingly, we find that the circuit court properly suppressed the evidence recovered by the police.

Because of our resolution, we need not consider defendant's argument that the alert by Tango did not give the police probable cause to search defendant's vehicle. See *People v. Campbell*, 67 Ill.2d 308 (1977) (the use of trained dogs as a follow-up investigative technique to partially corroborate information received is a permissible procedure, and the ensuing alerts by the dogs, in light of the information available to police, gave the police probable cause to arrest defendants). Also, we have analyzed the issues in this case in terms of the dog-sniff test of defendant's vehicle. We note that defendant was in the vehicle at the time the police conducted the dog-sniff test and that the police recovered the cannabis from defendant's person, not from the vehicle. Again, because of our resolution of this cause, we need not consider whether it was appropriate for the police to conduct the dog-sniff test with defendant inside the vehicle. See *People v. Fondia*, 317 Ill.App.3d 966 (2000). We simply note that other considerations may factor

in a search of a driver's person as opposed to a search of the driver's vehicle. *Cf. United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) (search of an occupant of an automobile); *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (search of an automobile passenger's purse).

CONCLUSION

For the aforementioned reasons, the judgment of the appellate court is affirmed.

Appellate court judgment affirmed.

Justice THOMAS, dissenting:

I strongly disagree with the majority's conclusion that defendant was subjected to an illegal detention. In fact, the majority's entire discussion of the length of the detention is inappropriate. The issue raised by the State—and the issue upon which we granted the State's PLA—is whether a canine sniff of a lawfully detained vehicle is a "search" under the Illinois Constitution. The majority affirms the appellate court not on this basis, but on the majority's spontaneous realization that the 15-minute traffic stop was unnecessarily and illegally long.

Although the principle is never stated in the opinion, the majority is apparently relying on the rule that a court of review can affirm on any basis supported by the record, regardless of the reasons given by the trial court. See *People v. Buss*, 187 Ill.2d 144, 205 (1999). My response is twofold. First, defendant has never properly pursued this theory. She did not raise the issue in her motion to suppress. The only issue raised in the motion was that the search of her vehicle was illegal because the officer had no

reason to believe that defendant had drugs or weapons. Accordingly, the issue of whether defendant was subjected to an illegal detention is waived. See *People v. Coleman*, 129 Ill.2d 321, 340 (1989) (issues not raised in the motion to suppress are waived). The only time that the issue was mentioned was in defendant's closing argument to the trial court on the motion to suppress. Nevertheless, the trial court specifically declined to reach the issue, and defendant did not raise the issue in either the appellate court or this court as a ground upon which the trial court's decision could be sustained. As the appellee in the appellate court and the supreme court, defendant was entitled to raise any arguments in support of the trial court's judgment, even if they were not directly ruled upon by the court. *People v. Monroe*, 118 Ill.2d 298, 300 (1987). Defendant did raise an alternative argument to support the trial court's judgment, but did not raise the illegal-detention issue. Whether this is because the issue is waived or is meritless is not clear. However, it is possible that defendant did not raise the argument because she is aware of the second part of the Monroe rule, which holds that any points advanced in support of the trial court's ruling must have a sufficient factual basis before the trial court. See *Monroe*, 118 Ill.2d at 300.

This brings me to my second point. There is no factual basis in the record upon which the majority could conclude that defendant suffered an illegal detention. Defendant has the burden of proof on a motion to suppress that alleges an illegal search or seizure. *People v. Williams*, 164 Ill.2d 1, 12 (1994). Defendant's attorney did not elicit any testimony showing that defendant was unlawfully detained longer than was necessary to process a traffic ticket. The only question about the length of traffic stops came when defendant's attorney was questioning Officer McCormick about a different traffic stop. Defendant's motion to suppress was heard at the same time as another motion to

suppress raising the same issue in a different case. The same attorney represented both defendant and the other defendant. When questioning Officer McCormick about the other traffic stop, the attorney asked him how long it normally took him to write a ticket. Officer McCormick's response was, "it varies; on average, 10 to 12 minutes, 15 minutes." The attorney did not ask him any further questions. The attorney did not ask why it varied, what the process involved, how long each part of the process took, or whether the officer was interrupted when writing out either of the tickets at issue. In defendant's case, Officer McCormick testified that the canine unit arrived approximately 15 minutes after the traffic stop commenced, while he was still writing the ticket. Thus, there is simply no basis in the record to conclude that defendant was illegally detained longer than was necessary to process the ticket. Indeed, the only way to reach such a conclusion is for the majority to determine *sua sponte* that Officer McCormick was lying. This is apparently what the majority has done when it asserts:

> "The State maintains, however, that the dog sniff of defendant's vehicle was justified because Deputy Zola arrived at the scene while Officer McCormick was writing the traffic ticket. We disagree." 202 Ill.2d at 469.

The majority never explains what leads it to conclude that Officer McCormick was not being truthful, unless it is asserting that it simply knows more than the police know about how long a traffic stop should take.

When justifying its decision, the majority subtly and improperly shifts the burden of proof to the State. The majority states that, "We have examined the record and find that it is devoid of circumstances which would justify the length of the detention." 202 Ill.2d at 470. In other words, defendant did not have to prove that the stop was

illegally and unnecessarily long. Rather, the State had to prove that the stop was sufficiently short. This is an improper reallocation of the burden of proof. The defendant had the burden to show that the detention was illegal, and she never attempted to do so.

The majority essentially draws a constitutional line in the sand at 15 minutes. If the traffic stop takes 15 minutes or more, the detention is illegal unless the State can justify the length of the detention. Interestingly, in one of the cases relied upon by the majority, *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), the United States Supreme Court refused to set the limit of a permissible traffic stop at 20 minutes:

> "The Court of Appeals' decision would effectively establish a *per se* rule that a 20-minute detention is too long to be justified under the *Terry* doctrine. Such a result is clearly and fundamentally at odds with our approach in this area." *Sharpe*, 470 U.S. at 686, 105 S.Ct. at 1575, 84 L.Ed.2d at 615.

Rather, the Court concluded, the inquiry must be made case-by-case and must consider whether the police pursued their investigation in a diligent and reasonable manner. *Sharpe*, 470 U.S. at 686-87, 105 S.Ct. at 1575-76, 84 L.Ed. 2d at 615-16. Here, the majority has pointed to no facts developed in the trial court that would lead it to conclude that Officer McCormick did not process the traffic stop in a reasonable and diligent manner. Instead, the majority bases its conclusion solely on the time—15 minutes—thus establishing an even more restrictive *per se* rule than the one the Supreme Court rejected in *Sharpe*.

Finally, the majority never explains how its decision is consistent with the Supreme Court's recent decision in *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). In *Atwater*, the Supreme Court held that the fourth amendment did not prohibit war-

rantless arrests for minor traffic violations that are punishable only by a fine. In that case, Atwater was stopped for failing to wear a seat belt and failing to secure a small child riding in the front seat. Each offense carried a penalty of a fine between $25 and $50. When the officer asked Atwater for her driver's license and proof of insurance, she told him that she did not have them because her purse had been stolen the day before. The officer told her that he had heard that story before, handcuffed her, placed her in the squad car, and took her to the police station. Once there, the police took her mug shot, inventoried her possessions, and placed her in a jail cell for an hour before she was taken before a magistrate and released on $310 bond. *Atwater*, 532 U.S. at 324, 121 S.Ct. at 1542, 149 L.Ed.2d at 558-59. Texas law authorizes arrests for minor offenses such as these, although the law also provides for citations to be issued in lieu of arrests. Atwater sued the city under 42 U.S.C. § 1983, alleging that the police had violated her fourth amendment right to be free from unreasonable seizures. *Atwater*, 532 U.S. at 325, 121 S.Ct. at 1542, 149 L.Ed.2d at 559. The district court granted summary judgment to the city, and the United States Court of Appeals for the Fifth Circuit reversed, holding that an arrest for a first-time seat belt offense was an unreasonable seizure under the fourth amendment. The United States Supreme Court granted *certiorari* and, in a 5-4 decision, reversed the Fifth Circuit. The Supreme Court held that, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater*, 532 U.S. at 354, 121 S.Ct. at 1557, 149 L.Ed.2d at 577. Atwater did not deny that she had committed the seat belt violation, and while the arrest and booking were inconvenient to her, the process was not so extraordinary as to violate the fourth amendment. The dissent pointed out that the majority opinion would neces-

sarily mean that, if a police officer arrests a person for a minor traffic violation, the officer would have a right to search the entire passenger compartment, including any purse or package inside, and also to impound the car and inventory all of its contents. *Atwater*, 532 U.S. at 371-72, 121 S.Ct. at 1567, 149 L.Ed.2d at 589 (O'Connor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

Just as in *Atwater*, defendant in this case committed an infraction that was punishable only by a fine. See 625 ILCS 5/12-201(c) (West 2000) (requiring rear registration light); 625 ILCS 5/16-104 (West 2000) (violations of provisions of the Vehicle Code for which no specific penalty is provided are petty offenses); 730 ILCS 5/5-1-17 (West 2000) (petty offense is punishable by a fine only). Further, just as in *Atwater*, the police officer had statutory authority to arrest defendant. See 725 ILCS 5/107-2(1)(c) (West 2000) (police officer may arrest someone when "[h]e has reasonable grounds to believe that the person is committing or has committed an offense"); 625 ILCS 5/16-102 (West 2000) ("The State Police shall patrol the public highways and make arrests for violation of the provisions of this Act"). Thus, Officer McCormick clearly had the statutory right to arrest defendant for the traffic offense. If he would have done so, he could have searched defendant incident to the arrest and conducted an inventory search of the vehicle. This would not have violated defendant's fourth amendment rights. *Atwater*, 532 U.S. at 354-55, 121 S.Ct. at 1557-58, 149 L.Ed.2d at 577.

Thus, current fourth amendment jurisprudence in Illinois is that the fourth amendment is *not* violated if the police conduct a full custodial arrest of a defendant for a minor traffic offense punishable only by a fine, but the fourth amendment *is* violated if the police take 15 minutes to write the traffic ticket. Unfortunately, the majority opinion leaves the police with no other choice but to conduct full

custodial arrests of people for minor traffic violations if it appears that it will take 15 minutes to process the traffic stop. Since 15 minutes is now presumptively unreasonable if the police cannot explain why the stop took 15 minutes, a police officer who hears the majority's fourth amendment timer ticking will have to take the person into custody if he wants to avoid having the seizure declared unlawful. Therefore, not only is the new 15 minute *per se* rule of dubious legality in light of *Sharpe*, it will create more problems than it will solve.

Curiously, after affirming on the basis that defendant was unlawfully detained for 15 minutes, the majority goes on to address the canine-sniff issue. The discussion of this issue is *dicta* because the majority has already determined that the evidence needed to be suppressed because of an unlawful seizure. Generally, this court will not "engage in speculative analysis or * * * render an advisory opinion * * * where, as in the instant case, such analysis or opinion is not necessary for the disposition of the cause." *Best v. Taylor Machine Works*, 179 Ill.2d 367, 470 (1997). However, because there are serious flaws in this part of the majority opinion, and the majority never makes clear that its discussion is *dicta*, I will address the issue too.

The majority opinion on the canine-sniff issue is based not on the law, but on the following nonlegal rationale: "[W]ere we to accept the State's contention that the dog-sniff test was permissible, we would be endorsing a drug-sniff test at every stop for a traffic violation." 202 Ill.2d at 470. This is a statement of policy, not of constitutional law. When the issue is analyzed within the proper legal and constitutional framework, the proper result is obvious.

We granted leave to appeal in this case to determine whether the appellate court erred in concluding that the Illinois Constitution requires that the police have a reasonable, articulable suspicion of criminal activity before con-

ducting a canine sniff of a lawfully detained vehicle. The appellate court based its decision on the Illinois Constitution because it recognized that the issue was foreclosed under the fourth amendment by the United States Supreme Court's decision in *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110, 121 (1983). See 318 Ill.App.3d at 165. In *Place*, the Supreme Court held that a canine sniff is not a search within the meaning of the fourth amendment. Apparently believing that the Illinois Constitution provides greater protection in this regard, the appellate court held that the Illinois Constitution requires that the police have a reasonable articulable suspicion of criminal activity before they may conduct a canine sniff. 318 Ill.App.3d at 165.

In affirming, the majority never states whether it agrees with the appellate court's analysis. The majority cites some general boilerplate language on *Terry* stops and mentions both the United States and Illinois Constitutions. However, it never makes clear if its holding is based on either or both. In fact, the one analytical paragraph of this section of the majority opinion contains no law whatsoever. See 202 Ill.2d at 471.

The majority's rationale is stated in a single paragraph that is remarkable both for what it does and does not say. What it says is that the holding is driven entirely by the desired result. The only insight into the majority's thinking is the nonlegal explanation that, "[W]ere we to accept the State's contention that the dog-sniff test was permissible, we would be endorsing a drug-sniff test at every stop for a traffic violation." 202 Ill.2d at 470. After stating this premise, the majority explains that the police did not have a reasonable articulable suspicion that defendant was engaging in criminal activity. What the paragraph does not say is how the majority arrived at this result. The majority concludes this lone analytical paragraph by once again

explaining, "if we held that Officer McCormick was justified in calling the canine unit, we would clearly support the view that police officers can resort to the use of canine units at every traffic stop." 202 Ill.2d at 471.

The majority fails to address the crucial threshold question of whether a canine sniff is a search. This question *must* be answered because if a canine sniff is not a search, then what authority would require the police to have either probable cause or a reasonable suspicion of criminal activity before conducting one? Critiquing the majority's analysis is difficult because there is no analysis to critique. Because the majority has given no reasons for its decision, this portion of the dissent will focus on what I believe to be the proper analysis under the relevant case law. Also, I will address the defendant's arguments and explain why the appellate court's analysis is flawed.

First, I will briefly note what is not at issue in this case. There is no question that the detention of defendant's vehicle was proper. The officer observed defendant committing a traffic violation, and therefore had a lawful basis to detain her. *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 332, 54 L.Ed.2d 331, 336 (1977). What is at issue here is whether the police, during the course of a lawful traffic stop, may conduct a canine sniff of the vehicle to detect the presence of narcotics.

The important threshold question of whether a canine sniff is a search under the fourth amendment was answered by the Supreme Court in *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).[1] In that case, the police seized a suspected drug courier's luggage at an airport and transported it to another airport so that it could be subjected to a canine sniff. The luggage was detained for

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[1] This case is notably absent from the majority opinion.

90 minutes. The Court held that the detention was unreasonably long, but also held that the canine sniff was not a search under the fourth amendment:

> "We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. [Citation.] A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d at 120-21.

The appellate court found *Place* dispositive of the issue under the fourth amendment, but held that the sniff was a search under the Illinois Constitution. The court, however, did not explain why it construed our state constitution as providing greater protection in this regard.

The appellate court is correct that we are free to construe our state constitution as providing greater protection than comparable provisions in the federal constitution. *People v. Mitchell*, 165 Ill.2d 211, 217 (1995). Nevertheless, the appellate court ignored the analysis we have set forth for determining when we will depart from a "lockstep" construction. As we have repeatedly stated, "[w]e must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution * * *." *People v. Tisler*, 103 Ill.2d 226, 245 (1984). We extensively analyzed this issue in both *Mitchell* and *Tisler* and concluded that the search and seizure provision of our state constitution was not intended to be broader than that in the fourth amendment. See *Mitchell*, 165 Ill.2d at 217-22; *Tisler*, 103 Ill.2d at 241-45.[2]

Our only recent departure from a lockstep construction of our search and seizure provision was in *People v. Krueger*, 175 Ill.2d 60 (1996), in which we held that we would not extend the holding of *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), to our state constitu-

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[2] The majority recognizes this very principle when it cites *Tisler* and explains that "the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution." 202 Ill.2d at 468. This principle is forgotten as soon as it is cited.

tion. *Krull* extended the good-faith exception to the exclusionary rule to searches based on statutes later declared unconstitutional. In *Krueger*, we noted the historical importance of our state exclusionary rule and stated that it had always been understood to bar evidence gathered under the authority of an unconstitutional statute. We found that the critical flaw in *Krull* was that it would allow for a grace period for unconstitutional search and seizure legislation, possibly lasting for several years, during which our citizens' constitutional rights could be violated with impunity. *Krueger*, 175 Ill.2d at 74-75. Accordingly, we held that such a grace period would be incompatible with our state exclusionary rule as we have always construed it. *Krueger*, 175 Ill.2d at 74-75.

Here, the concerns that caused us to depart from lockstep in *Krueger* are not present, nor has defendant or the majority explained why the *Mitchell / Tisler* analysis would not apply to this case. Rather, defendant argues that the Fifth District was correct in following out-of-state cases in which the courts declined to follow *Place* and held that canine sniffs were searches under their state constitutions. See *State v. Pellicci*, 133 N.H. 523, 580 A.2d 710 (1990); *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990); *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987); *Pooley v. State*, 705 P.2d 1293 (Alaska App. 1985). None of these courts, however, follow the same analysis that we do in determining whether to construe a provision of our constitution more broadly than its federal counterpart. In these cases, the courts chose not to apply the *Place* rationale to their state constitutions. However, they did not first look to the intent of the framers of their respective state constitutions. Thus, I believe that the appellate court erred in following these cases rather than the *Mitchell / Tisler* analysis.

In my opinion, this court should hold that a canine sniff is not a search under article I, section 6, of our state constitution. As noted, *Place* held that a canine sniff of lawfully detained luggage at an airport is not a search. The Supreme Court reaffirmed the *Place* holding in *United States v. Jacobsen*, 466 U.S. 109, 122-24, 104 S.Ct. 1652, 1661-62, 80 L.Ed.2d 85, 100-01 (1984), and broadly construed it as providing that police investigatory methods that only disclose the presence or absence of contraband do not implicate the fourth amendment. Prior to *Place*, this court had already held that a canine sniff of baggage at an airport did not implicate the fourth amendment because people cannot have a justifiable expectation of privacy in the smell of contraband in a container exposed to the public. *People v. Campbell*, 67 Ill.2d 308, 316 (1977).[3]

Recently, the United States Supreme Court has specifically stated that a canine sniff of a vehicle is a not a search. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), the Supreme Court held invalid a checkpoint procedure that had as its primary purpose the detection of narcotics. The Supreme Court held that the detentions violated the fourth amendment because their primary purpose was to uncover evidence of ordinary criminal wrongdoing. *City of Indianapolis*, 531 U.S. at 48, 121 S.Ct. at 458, 148 L.Ed.2d at 347-48. Importantly, however, the Court specifically held that the use of canines to sniff the vehicles at the checkpoints did not turn the unlawful seizures into unlawful searches:

> "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. [Citation.] The fact that officers walk a narcotics-detection dog

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[3] Like *Place*, this decision is conspicuously absent from the majority opinion.

> around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. [Citation.] Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. [Citation.] Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.' [Citations.] Rather, what principally distinguishes these checkpoints from those we have previously approved is their primary purpose." *City of Indianapolis*, 531 U.S. at 40, 121 S.Ct. at 453, 148 L.Ed.2d at 342-43.

Additionally, several lower federal courts have considered whether canine sniffs of lawfully detained vehicles are searches and have concluded that *Place* applied. For instance, in *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir.1990), the court held that canine sniffs of vehicles lawfully detained at a roadblock were not searches. In that case, the sniff was of the exterior of a vehicle that was lawfully detained on a public highway. The court first noted that there is a lesser expectation of privacy in a vehicle than in a home or one's bodily integrity. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116, 1130 (1976). The court then explained that, when the odor of narcotics escapes from a vehicle, society does not recognize a reasonable privacy interest in the airspace containing the incriminating odor. *Morales-Zamora*, 914 F.2d at 205. See also, *e.g.*, *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999) (canine sniff of U-Haul stopped for speeding not a search); *United States v. Glinton*, 154 F.3d 1245, 1257 (11th Cir.1998) (canine sniff of lawfully detained vehicle not a search); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993) (canine sniff of lawfully detained vehicle not a

search; thus, individualized suspicion of drug-related activity not required).

For the same reasons that these courts have rejected the argument that a canine sniff of a lawfully detained vehicle is not a search under the fourth amendment, this court should reject defendant's argument that the canine sniff of her vehicle violated article I, section 6, of our state constitution. A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Jacobsen*, 466 U.S. at 113, 104 S.Ct. at 1656, 80 L.Ed.2d at 94. A person cannot have a justifiable expectation of privacy in the odors emanating from his car on a public highway (*Morales-Zamora*, 914 F.2d at 205), and the desire to conceal the odor of contraband is not a protectable expectation of privacy (*Campbell*, 67 Ill.2d at 316). Because a canine sniff is not a search, we should reject the appellate court's conclusion that the police need a reasonable suspicion of criminal activity before they may conduct a canine sniff of a lawfully detained vehicle. Instead, the majority affirms the appellate court decision without giving a single defensible *legal* rationale for its decision.

Defendant argues that the Supreme Court's recent decision in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), mandates an affirmance in this case. I disagree. In *Kyllo*, agents of the federal government believed that the defendant was growing marijuana in his home. Indoor marijuana growth requires the use of high-intensity heat lamps. The agents used a thermal imaging device to scan the defendant's home to determine the amount of heat in different parts of the house. The device detects infrared radiation emitted from the house. The agents studied the scan and noted that the roof over defendant's garage was noticeably warmer than the rest of the house. The agents acquired a search warrant and discovered a marijuana-growing operation involving more than

100 plants. *Kyllo*, 533 U.S. at 29-30, 121 S.Ct. at 2041, 150 L.Ed.2d at 99-100.

The Supreme Court held that the use of the thermal imaging device was a search under the fourth amendment and was thus presumptively unreasonable without a warrant. *Kyllo*, 533 U.S. at 40, 121 S.Ct. at 2046, 150 L.Ed.2d at 106. *Kyllo* is distinguishable, however, because the Court's concern was in the use of advanced technology to reveal the intimate details of a private home. The Court held that in the home "*all* details are intimate details, because the entire area is held safe from prying government eyes." (Emphasis in original.) *Kyllo*, 533 U.S. at 37, 121 S.Ct. at 2045, 150 L.Ed.2d at 104. Additionally, the Court began its analysis by stating that, "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" (*Kyllo*, 533 U.S. at 31, 121 S.Ct. at 2041-42, 150 L.Ed.2d at 100, quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734, 739 (1961)), and concluded it by stating that the fourth amendment "draws 'a firm line at the entrance to the house'" (*Kyllo*, 533 U.S. at 40, 121 S.Ct. at 2046, 150 L.Ed.2d at 106, quoting *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980)).

Thus, the Supreme Court's decision in *Kyllo* was based on the heightened expectation of privacy one has in one's home. As I have already noted, a person has a lesser expectation of privacy in a vehicle than in a home or one's bodily integrity. *Martinez-Fuerte*, 428 U.S. at 561, 96 S.Ct. at 3084, 49 L.Ed.2d at 1130. Further, the Supreme Court views the thermal imaging device as something that reveals the intimate details of a home (*Kyllo*, 533 U.S. at 37-38, 121 S.Ct. at 2045, 150 L.Ed.2d at 104), but a canine sniff as something that reveals only the presence or absence of contraband (*Place*, 462 U.S. at 707, 103 S.Ct. at 2644, 77

L.Ed.2d at 121). Thus, I disagree with defendant's assertion that *Kyllo* mandates an affirmance in this case.

I also disagree with the appellate court's holding (and the majority's apparent implied holding) that canine sniffs should be considered limited investigatory stops governed by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* allows the police to briefly detain an individual when the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry*, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911. Additionally, the officer is allowed, without a warrant, to conduct a careful limited search of the person when his observations reasonably lead him to believe that the person might be carrying a weapon. The purpose of the "frisk" is to allow the police, for their own safety and the safety of others, to determine if the person is *armed*. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. The Court reached its decision by balancing the need to search against the invasion the search entails. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879-80, 20 L.Ed.2d at 905-06, quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930, 940 (1967). As Professor LaFave has noted, however, "there is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found." 4 W. LaFave, *Search & Seizure* § 9.5(g), at 300 (3d ed. 1996). See also *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334, 344 (1993) (sole justification for a *Terry* frisk is the protection of the police officer and others, not to gather evidence); *People v. Flowers*, 179 Ill.2d 257, 263 (1997) (same); *Arizona v. Hicks*, 480 U.S. 321, 328-29, 107 S.Ct. 1149, 1154, 94 L.Ed.2d 347, 356 (1987) (refusing to recognize an intermediate type of search between a plain-view inspection and a "full-blown search" that would merely require a reasonable suspicion); *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343, 62

L.Ed.2d 238, 247 (1979) (*Terry* cannot be understood to allow any search whatever for anything but weapons); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639, 661 (1989) (balancing test is appropriate only when warranted by special needs beyond the normal need for law enforcement). Thus, the majority's apparent belief that a canine sniff for narcotics is a search that can be conducted on an officer's mere reasonable suspicion impermissibly extends *Terry* to general searches for evidence. Accordingly, because the Supreme Court requires *probable cause* for warrantless searches of vehicles (see, *e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408, 414-15 (1999)), the majority has unwittingly construed the search and seizure provision of our state constitution as providing *less* protection than its federal counterpart. The majority's opinion is thus wholly invalid and subject to reversal by the United States Supreme Court.

In sum, the answer to the question of whether a canine sniff is a search leads to two possible outcomes. If a sniff is a search, then the police need probable cause to conduct one. If a sniff is not a search, then neither the fourth amendment nor article I, section 6, of the Illinois Constitution is implicated. There simply cannot be a "reasonable suspicion" middle ground because the United States Supreme Court has not expanded *Terry* to general searches for incriminating evidence, as opposed to searches for weapons.

The majority thus refuses to answer the threshold question, because an answer cannot lead to its result. Instead, the majority has issued a policy decision with no foundation in the law. The majority bases its opinion solely on its desire not to see canine sniffs allowed at every lawful traffic stop. Such an analysis begs the question of whether either the United States or Illinois Constitution forbids canine sniffs of lawfully detained vehicles. Because the United

States Supreme Court has held that a canine sniff is not a search, and we have construed the search and seizure provision of our state constitution in lockstep with its federal counterpart, I am unable to see how either constitution would forbid a canine sniff of a lawfully detained vehicle. Unfortunately, the explanation is nowhere to be found in the majority opinion.

JUSTICES FITZGERALD and GARMAN join in this dissent.

[Filed December 5, 2000]

No. 5-99-0238

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JUSTICE GOLDENHERSH delivered the opinion of the court:

Anne F. Cox (defendant) was charged by way of information with unlawful possession of cannabis pursuant to section 4(a) of the Illinois Cannabis Control Act (720 ILCS 550/4(a) (West 1998)). A motion-to-suppress hearing was held, and the trial court found that the police violated defendant's fourth amendment rights (U.S. Const., amend. IV) and privacy rights under the Illinois Constitution (Ill. Const. 1970, art. I, § 6). The State filed a timely notice of appeal on April 5, 1999. On appeal, the State presents one issue for review: whether the government needed at least reasonable suspicion to conduct a walk-around of defendant's vehicle by a drug-sniffing dog while defendant was being lawfully detained at a routine traffic stop. For the reasons that follow, we affirm.

I. FACTS

On July 20, 1998, the State charged defendant by way of information with the offense of unlawful possession of cannabis. On February 3, 1999, defendant filed a motion to suppress alleging that defendant was arrested for the offense of not having a rear registration light and that Illinois law does not permit the police to search vehicles after routine traffic stops unless the police possess a strong reason to suspect that the vehicle is carrying drugs or weapons.

On March 18, 1999, a hearing on defendant's motion to suppress was held before the trial court. Defendant called

Matt McCormick, a Fairfield police officer, as a witness. McCormick testified that on July 18, 1998, around 2:21 a.m., he observed that defendant's vehicle did not have a rear registration light. McCormick stopped the vehicle. When he spoke with defendant, he did not smell marijuana in the car. Just after the stop, McCormick notified Deputy Zola, who subsequently arrived at the scene with canine drug dog Tango. McCormick believed that it took about 15 minutes for Deputy Zola and Tango to arrive. McCormick had testified that it ordinarily takes 10 to 15 minutes for him to write a ticket. McCormick was busy writing a traffic citation when Deputy Zola and Tango arrived. The dog sniffed about the vehicle and positively alerted the police to the presence of contraband. McCormick testified that the vehicle was first searched after the drug dog alerted, whereupon cannabis residue and seeds were found on the floorboard of the car. After observing this evidence of contraband, Deputy Zola asked defendant to empty her pockets. Cannabis was found on defendant's person. McCormick stated that he was still in the process of writing the traffic ticket when Deputy Zola and Tango arrived.

After McCormick testified, the parties presented their respective arguments. Defendant argued two bases in support of her motion to suppress: (1) no probable cause existed to justify a search of the exterior of the vehicle by the canine unit and (2) the length of the detention was unreasonably long, constituting a seizure. The trial court took the matter under advisement.

On March 30, 1999, the trial court entered a written order granting defendant's motion to suppress. The trial court relied on the Appellate Court, Third District, decision in *People v. Easley*, 288 Ill.App.3d 487 (1997), and concluded, "[T]he officer's testimony revealed no reasonable basis which would justify the walk[-]around." The trial court held that because the walk-around was illegal, the pat-down of defendant was illegal and defendant should

have been allowed to leave. The trial court did not make a finding on the question of whether defendant was unreasonably delayed.

II. ANALYSIS

The first issue on appeal is whether the exterior sniff of defendant's vehicle violated her fourth amendment right against unreasonable searches and seizures. Where there is no issue of fact, we conduct a *de novo* review of a trial court's determination of reasonable suspicion or probable cause on a motion to suppress. *Ornelas v. United States*, 517 U.S. 690, 698-700, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, 920-21 (1996); *People v. Kidd*, 175 Ill.2d 1, 25-26 (1996); *Easley*, 288 Ill.App.3d at 491.

The fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." U.S. Const., amend. IV. It does not hinge upon the place in question but, rather, hinges upon whether the person has a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967); *People v. Neal*, 109 Ill.2d 216, 221 (1985).

The State presents the argument that our United States Supreme Court has ruled, in *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983), that a canine sniff does not constitute a search under the fourth amendment, and since the canine unit arrived while the officer was still writing defendant's traffic ticket, no detention occurred and no fourth amendment issue arose. See *Place*, 462 U.S. at 697-710, 103 S.Ct. at 2639-46, 77 L.Ed.2d 110. The State's argument hinges upon the contention that a canine sniff is not a search. If that contention is correct, the only way the fourth amendment is applicable is if the police detained the driver and/or

vehicle for longer than it takes to write a traffic ticket, which would then trigger the seizure aspect of the fourth amendment. This argument is consistent with the majority holding in *Place*.

In *Place*, the defendant was traveling from Miami International Airport to New York's La Guardia Airport. While in line in Miami, law enforcement officers' suspicions were aroused, and they approached the defendant. The defendant consented to have his two bags searched, but his plane was departing so the law enforcement officers let the defendant proceed on his way. After finding some discrepancies with the address tags on his luggage, the law enforcement officers contacted the Drug Enforcement Agency (DEA) in New York. Upon the defendant's arrival in New York, the DEA agents approached the defendant. They told the defendant that they believed he was carrying narcotics, and they asked for and received identification. The defendant refused to consent to a search of his luggage, upon which the DEA agents told him that they were going to a federal judge to obtain a search warrant. The DEA agents took the luggage to Kennedy Airport, and there a canine unit performed a canine drug sniff. The dog positively alerted the agents to narcotics in one of the suitcases. The sniff occurred 90 minutes after the agents seized the luggage from the defendant. The agents used the positive canine alert to obtain a search warrant. They then opened the suitcase and discovered cocaine. The defendant pleaded guilty, after his motion to suppress was denied. *Place*, 462 U.S. at 697-701, 103 S.Ct. at 2639-41, 77 L.Ed.2d 110. The case proceeded to the United States Supreme Court, which held that seizure of the luggage violated the fourth amendment, based upon the seizure of the luggage without probable cause. *Place*, 462 U.S. at 706, 103 S.Ct. at 2644, 77 L.Ed.2d 110. In *dicta*, the Court stated that if the DEA agents had a dog present to sniff the luggage immediately, there would not have been a fourth amendment issue,

because there would not have been seizure (for 90 minutes), nor would there have been a search, because the canine sniff is not a search under the fourth amendment. *Place*, 462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d 110.

The State analogizes the present case to *Place*. It argues that since the canine unit arrived while Officer McCormick was writing the traffic ticket, no seizure of person or vehicle occurred, and that since the exterior canine sniff does not constitute a search, no fourth amendment issue is present. This argument is consistent with the majority opinion in *Place*, which bluntly states in *dicta*, "[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 462 U.S. at 707, 103 S.Ct. at 2645, 77 L.Ed.2d 110. Therefore, we do not agree with the trial court that the exterior vehicle canine sniff violated defendant's fourth amendment rights in this case.

Article I, section 6, of the 1970 Illinois Constitution states, "The people shall have the right to be secure in their persons, houses, papers[,] and other possessions against unreasonable searches, seizures, invasions of privacy[,] or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6. The fourth amendment sets the minimum rights a person shall receive against unreasonable government search and seizure. The Illinois Constitution can give people more protection. The United States Supreme Court has ruled in *Place* that a canine sniff does not constitute a search under the fourth amendment. *Place*, 462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d 110. However, a canine sniff may still constitute a search under section 6 of article I of the 1970 Illinois Constitution.

The Illinois Appellate Court, Third District, has found that reasonable suspicion is necessary for a dog sniff in

Easley, 288 Ill.App.3d 487. In *Easley* the defendant was pulled over for no rear registration light and failure to signal a turn. The officer approached the vehicle and asked for the defendant's driver's license. As the defendant removed his license, the officer noticed a business card decorated with a marijuana leaf. This aroused the officer's suspicion, and he conducted a criminal check of the defendant. The criminal history check revealed a past drug conviction. The officer returned to the vehicle, at which time he noticed that the previously open ashtray was now closed. The officer stated that the defendant was visibly nervous with perspiration. The officer called a canine unit and informed the defendant that he and the passenger were free to leave but the vehicle would have to remain so a dog could sniff the exterior of the vehicle. The canine unit arrived two minutes later and alerted the officers to the presence of contraband. The positive alert provided the officers with probable cause to search the vehicle, which resulted in the finding of marijuana. The court reasoned that the officer had sufficient reasonable suspicion to warrant a detention limited in scope. The fact that the canine unit arrived in two minutes was important as to avoid a fourth amendment question of an illegal seizure without probable cause. Once the canine unit positively alerted the officers to the presence of contraband, the officers had probable cause to search. *Easley*, 288 Ill.App.3d at 491-92. It should be noted that *Easley* required that government action be judged by a totality-of-the-circumstances standard, and facts that could be individually explained as innocent might still constitute reasonable suspicion when combined with all the facts in the case. *Easley*, 288 Ill.App.3d at 491-92; see *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir.1996).

Easley is a classic *Terry* investigatory stop. See *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The officer's suspicions were aroused, and, as established in *Terry* and its progeny, he could investigate his suspicions

until they were allayed or sufficient time passed so as to push the situation from an investigatory stop to a seizure. *Easley*, 288 Ill.App.3d 487. In 1968, in *Terry*, the United States Supreme Court recognized the narrow authority permitting police officers to make limited intrusions on an individual's personal security based on less than probable cause. See *Michigan v. Summers*, 452 U.S. 692, 698, 101 S.Ct. 2587, 2591, 69 L.Ed.2d 340 (1981). While initially implemented to protect police officers from concealed weapons by allowing a pat-down of a suspect's outer garments, *Terry* and its progeny have been extended to almost any situation in which a law enforcement officer has a reasonable suspicion of criminal activity. *Terry*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340; *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The logic of *Terry* lies in the balancing of the competing interests of a person's fourth amendment rights against the government's interest in preventing crime. *Place*, 462 U.S. at 703, 103 S.Ct. at 2642, 77 L.Ed.2d 110.

A *Terry* stop amounts to a brief intrusion to verify information or to ascertain criminal activity. See *People v. Koutsakis*, 272 Ill.App.3d 159 (1995); *People v. Frazier*, 248 Ill.App.3d 6, 14 (1993). The investigatory stop must be as brief as possible and last no longer than necessary to effectuate the purpose of the stop. See *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983); *Koutsakis*, 272 Ill.App.3d 159. During traffic stops, as is the case before us, the police may briefly stop and detain a vehicle that violates the traffic laws. *Koutsakis*, 272 Ill.App.3d 159. The officer may request the driver's license of the person operating the vehicle and may conduct a background check. *Koutsakis*, 272 Ill.App.3d 159. If no

further suspicion is aroused, then the officer must allow the driver and vehicle to go. See *People v. Smith*, 208 Ill.App.3d 44, 50 (1991); *Koutsakis*, 272 Ill.App.3d 159. This is the issue before us. Did the police officer have the legal justification to call a canine unit to conduct an exterior canine sniff of defendant's vehicle?

In this case, the officer lacked reasonable suspicion sufficient to call the canine unit. At the motion-to-suppress hearing, Officer McCormick could point to no fact that aroused his suspicion. *Terry* and its progeny clearly establish that when an officer investigates based on reasonable suspicion, he must be able to point to articulable facts that gave rise to said suspicion. *Terry*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340; *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607.

This holding is consistent with other jurisdictions with clauses in their state constitution similar to article I, section 6, of the 1970 Illinois Constitution[1]. In *State v. Pellicci*, 133 N.H. 523, 580 A.2d 710 (1990), the New Hampshire Supreme Court decided a case involving a canine sniff of a vehicle. In *Pellicci* the police conducted a three-month controlled substance sales investigation in the Portsmouth area. The investigation involved monitoring Club Excalibur,

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[1] "The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy, or interception of communications by eavesdropping devices or other means. No warrant shall issue without probable cause supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6.

a local spirits establishment. Officers observed the defendant leave the establishment on multiple occasions with other patrons, drive to a park, and remain in his vehicle for 15 to 20 minutes. On at least one occasion, the monitoring officers observed money exchanging hands, and on another occasion, they noticed passengers bending down from the waist, an action indicating cocaine inhalation. On one evening, officers received a tip from a confidential informant that a drug transaction was about to occur. Acting on the tip, an officer was stationed on the route from Club Excalibur to the park and pulled the defendant over to conduct a canine sniff. The defendant challenged the validity of what he regarded as a search, while the State of New Hampshire relied on *Place* and argued that a canine sniff is not a search under the fourth amendment. The New Hampshire Supreme Court agreed, at least partially, with both sides. It held that according to *Place* a canine sniff is not a search; however, relying on part I of article 19 of the New Hampshire Constitution[2], the court held that the government needs articulable facts that give rise to a reasonable suspicion to justify a canine sniff. The *Pellicci* court analogized the canine sniff to a *Terry* stop. *Pellicci*, 133 N.H. 523, 580 A.2d 710.

In *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), the New York police, prompted by information that controlled substances were being kept in an apartment leased by the defendant in Hamburg, New York, conducted a canine sniff in the common hallway of the apartment. The dog positively alerted the police to the presence of contraband, and the police obtained a search

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[2] Part I, article 19[,] of our Constitution accords "[e]very subject . . . a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." *Pellicci*, 133 N.H. at 532, 580 A.2d at 716 (quoting N.H. Const., part I, art. 19).

warrant to search the apartment. The search resulted in finding large amounts of marijuana and cocaine. The defendant moved to suppress the evidence before the trial, claiming that the canine sniff constituted an unlawful warrantless search unsupported by probable cause. The motion to suppress was denied. The New York Court of Appeals held that pursuant to *Place* (a canine sniff is not a search under the fourth amendment (462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d 110)), the government action did not violate the defendant's federal constitutional rights against unreasonable searches and seizures. However, the court found that a canine sniff was a search under article I, section 12, of the New York Constitution (N.Y. Const., art. I, § 12).[3]

In *Pennsylvania v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987), the Pennsylvania Supreme Court ruled that a reasonable articulable suspicion is necessary for the government to conduct a canine sniff under article I, section 8, of the Pennsylvania Constitution (Pa. Const., art. I, § 8)[4]. In *Johnston*, a police officer observed two men carrying what appeared to be, from the officer's 17 years of experience, two bales of marijuana from a rental storage facility. Based upon this observation, the officer received permission from

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[3] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." N.Y. Const., art. I, § 12.

[4] "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Pa. Const., art. I, § 8.

the owners of the storage facility to walk a canine unit through the hallway. The canine positively alerted the officer to the presence of contraband in a locker rented by the defendant. The Pennsylvania Supreme Court held that, according to the United States Supreme Court in *Place*, the canine sniff did not constitute a search under the fourth amendment. However, the Pennsylvania Supreme Court ruled that under their state constitution, the canine sniff must be based upon some articulable facts that give rise to a reasonable suspicion that contraband is located in the place being sniffed by the canine. *Johnston*, 515 Pa. 454, 530 A.2d 74.

In an Alaskan case, *Pooley v. State*, 705 P.2d 1293 (1985), law enforcement agents conducted two canine sniffs of luggage. One took place in California, which the court did not address because the Alaska Constitution[5] does not apply to agents or persons in California, and the second occurred upon the defendant's arrival at Anchorage International Airport. See Alaska Const., art. I, § 14. The Court ruled that a canine sniff is not a search under the fourth amendment, pursuant to *Place*, 462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d 110. However, as the courts in New Hampshire, New York, and Pennsylvania held, the state constitution may afford more protection. The Alaska Court of Appeals ruled that a canine sniff should be governed by the principles of *Terry* and its progeny; the government must be able to point to articulable facts that give rise to a reasonable suspicion that the object being sniffed contains contraband. *Pooley*, 705 P.2d at 1311.

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[5] "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Alaska Const., art. I, § 14.

These cases indicate a similar application of *Terry* principles to canine sniffs. While there is no uniformity throughout the nation for this approach, the question is clearly one that could reasonably apply *Terry* and its progeny. Therefore, we hold that a canine sniff is not a search under the fourth amendment, pursuant to *Place*, 462 U.S. at 707, 103 S.Ct. at 2644-45, 77 L.Ed.2d 110. However, we also hold that to conduct a canine sniff, the government must have a reasonable suspicion of criminal activity, based upon articulable facts, under article I, section 6, of the 1970 Illinois Constitution (Ill. Const. 1970, art. I, § 6).

For the foregoing reasons, the judgment of the circuit court of Wayne County is affirmed.

Affirmed.

HOPKINS and KUEHN, JJ., concur.

Ill.App. 5 Dist., 2000.